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I. INTRODUCTION—THE PROBLEMS OF COMPARISON

This final contribution to our seminar is organized by themes, not by countries. What we have been doing well for these two days is creating the bricks of the foundation of comparison—a necessary step in comparativism—without explicitly talking about what it means to compare. And so to conclude our conference and perhaps to add some mortar that makes these bricks stick together, I offer the following observations regarding comparison and the things we have compared.

There exists a certain element of inevitability of comparison when one studies foreign legal systems and laws. During our seminar, Professor Ronald A. Brand explained that his comparativist colleague at the University of Pittsburgh, Vivian G. Curran, gradually has changed her lecture course title from "Introduction to Comparative Law" to "Comparative Legal Studies" to "Civil Law Systems" because, when working between entire families of law—not just between different countries—she feels that the element of comparison is so inherent that when a student in a common-law country studies a civil system, the word *comparison* needs not be explicit in the title. Some dangers with treating comparativism as inherent or implicit is that one may then treat the act of comparison as an obvious set of operations and treat the

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questions of comparative law as though they are already answered and their answers agreed upon.

Within the discipline of comparative law, some debate exists today between proponents of what is known as the *functionalist* approach and the proponents of what is known as the *dialogic* approach. I adopt the traditional functionalist approach from two of the founders of the present discipline of comparative law, Konrad Zweigert and Hein Kötz. In her *Comparative Law: An Introduction*,[1] Curran made a valuable critique of the seminal work done by Zweigert and Kötz.[2] Zweigert and Kötz practiced their science of legal comparativism in what we would today call the *universalist school* by looking for similarities in different systems, "even sometimes going so far as to view comparative law as the basis for identifying the 'best' approach with the ultimate aim of securing its universal adoption."[3] Support for the universalist position comes from the notion that all societies are trying to solve similar problems within their respective legal systems.[4] Curran's sociohistorical critique of that method is that the method puts the rabbit in the magician's hat—if one assumes that similarities exist, either implicitly or explicitly, then one is, of course, going to find similarities. As a thoughtful critic, she then asked why Zweigert and Kötz assumed that similarities existed. According to Curran, it was their own life experiences of an ideologically twisted political regime—the National Socialist German Workers' Party (better known as the "Nazis"). The Nazis put a different rabbit in the hat—they assumed differences existed and consequently began from that assumption when dehumanizing some humans to build their natural and social "sciences."

Thus, it would seem that a root problem in comparative law is that of building foundations that use blocks of unexamined assumptions—either of similarity or of difference. Can we escape from the conundrum of assuming that either similarities or differences may always be found when comparing two or more of any phenomena? Not likely. Curran concluded that the solution, therefore, in comparing a foreign legal culture to our own or an-

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1. VIVIAN GROSSWALD CURRAN, COMPARATIVE LAW: AN INTRODUCTION (Carolina Acad. Press 2002).

2. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW, Tony Weir, trans. (Oxford 3d ed. 1998).

3. Christopher McCrudden, *Judicial Comparativism and Human Rights*, *in* COMPARATIVE LAW: A HANDBOOK 371-98 (Esin Örücü & David Nelken, eds., 2007).

4. *See* REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS 34 (Kirk W. Junker & P. Matthew Roy, trans., 10th ed. Carolina Acad. Press 2008).

other is to immerse ourselves in that foreign legal culture in order to understand it sufficiently on its own terms to avoid, to the extent possible, the need for assumptions and thus make a superior comparison.[5] Of course, immersion is often not possible. To remedy this practical difficulty ever so slightly, we have had the uncommon luxury during this seminar of bringing legal scholars from elsewhere to us, rather than our needing to travel to nearly a dozen other countries. But even when we do not have that option, we should not stop practicing comparativism, albeit with extra care. Some of the students or lawyers whom I teach have found the following three levels of personal practice and engagement in comparative study to be a helpful set of operating principles.

1. As a "tourist," the comparativist goes to another country with his or her own values and lives in a real or metaphorical tourist world of hotels, museums, public transportation, and shopping.

2. As a "visitor," the comparativist goes to another culture and takes part in the other culture's world as a visitor: groceries, family life, work, education, bureaucracy, and documentation are all parts of the visitor's life. He or she may even own or rent a house and has, as a goal, to learn that culture, albeit from the outside.

3. As a "traveler," the comparativist goes to another culture as at level 2, above, but the traveler then also asks the host culture for its perspective of the traveler's own culture.

And if it is not possible for someone to travel at all in order to immerse oneself, one can nevertheless practice comparativism as a "reader" by going directly to the word only, without direct sense experience, and reading the accounts of another culture's descriptions of its own culture and the accounts of the reader's culture. For these two days, by bringing a multitude of exceptional foreign legal scholars to Duquesne University School of Law, the School of Law has brought to the student and lawyer in Pittsburgh the reader's opportunities of the best sort—those in which one can also engage the foreign visitor directly, without needing to leave home.

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5. CURRAN, *supra* note 1.

We shall have used this opportunity to question and be questioned, and to become conscious of the assumptions we have made, and make them explicit and open for honest intellectual debate in this public forum, rather than to proceed with assumptions that, if left unexamined, may be shared by our interlocutors, but may just as likely be understood differently or even refuted by our interlocutors.

II. WHY COMPARE?

Thus, we proceed, conscious of why we might want to make comparisons. Why indeed do we compare the various receptions of the legal concepts of separation of powers among the states represented here—Argentina, Brazil, Colombia, Venezuela, Costa Rica, Mexico, the United States, Canada, Macedonia, and Germany? With what specific assumptions do we begin the comparison? Are we assuming similarities or assuming differences? At the core, it would, of course, appear that we are assuming similarities—after all, we have styled the title of the seminar as "Separation of Powers in the Americas . . . and Beyond," a title that suggests to the audience that each of the states has some operative notion of separation of powers. Even if the notions differ from state to state, some similarity must be assumed in the interpretation of the phrase *separation of powers* in order to support the inclusion of each state's position in this seminar.

In fact, history will show that, in some instances, states did explicitly borrow legal concepts from other states when drafting constitutions or establishing institutions. In discussing the separation of powers in Brazil, Professor Keith S. Rosenn noted that history was necessary for understanding the comparison. (He also tied this seminar to our last seminar by pointing out that federalism, the topic of our 2007 seminar, is itself an aspect of the separation of powers.) The Brazilian Constitution was modeled on the Spanish Constitution and the Weimar Constitution of 1934. So, a first and perhaps most obvious answer to the question of "why compare?" is to borrow ideas learned from other cultures, even in public law, in order to perhaps improve our own systems. Zweigert and Kötz themselves adapted their position from that of Rudolph von Jhering, from whom they quote the famous statement:

> The reception of foreign legal institutions is not a matter of nationality but of usefulness and need. No one bothers to

> fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.[6]

We were warned no fewer than three times during the seminar, however, by Professors Rosenn and Brand and also by Professor Alejandro Miguel Garro of Argentina that ideas from different cultures do not move to another culture without undergoing some change, intended or not, just as when one translates a word from one language to another. Professor Garro noted that, whereas *procurator general* is a proper but relatively unknown translation into English of one of the Brazilian executive offices, it would be wrong to make it the more familiar American English term *attorney general*, because that person is a member of the cabinet. He further noted that it would be equally as wrong to call that person the *solicitor general*. To extend the point, Professor Rosenn suggested that American public law does not have an English expression for *coup d'état* for the reason that it is not a phenomenon that has ever occurred in the United States, and therefore U.S. Americans have never had to put a name to it. On a more negative note, although for the same reasons, Rosenn also pointed out that there is no word for *accountability* in Portuguese or Spanish.

Why else compare? One could be so dramatic as to answer "to prevent war." In the congenial atmosphere of this seminar, we might want to say that war among our respective states will not happen. Yet, simply among the states represented here, the United States has been at war on separate occasions against Mexico, Germany, parts of Yugoslavia (though not Macedonia), and British-provincial Canada. Of course, within Latin America, there have also been a number of wars.

One might also compare so as to avoid tyranny. When powers are not separated, one might find it easier to make such statements as those of President Hugo Chavez in Venezuela: "I am the law; I am the state."[7] By contrast, regarding the United States, John Adams famously stated in 1776 that we are "a nation of laws, not of men." Indeed, it would seem that by separating the powers of the executive branch from the powers of the legislative branch, constitutional systems like that of the United States

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6. RUDOLPH VON JHERING, 1 GEIST DES RÖMISCHEN RECHTS 8 (Benno Schwabe, Basel 9th ed., 1955) (1852), *reprinted in* ZWEIGERT AND KÖTZ, *supra* note 2, at 17.

7. Allan R. Brewer-Carías, Address at the Duquesne University School of Law, Separation of Powers in the Americas . . . and Beyond (Nov. 7, 2008).

would make it impossible, or at least unconstitutional, to equate the existence of the state with a person. Professor Robert S. Barker reminded us in his opening remarks in the seminar program that Thomas Jefferson "observed that the concentration of all governmental power in the same hands is the very definition of despotism."[8] Thus, one clear advantage to understanding and practicing the separation of powers, which one may well assume is enhanced through comparative study, is to avoid tyranny.

And finally, as an echo of my levels of engagement for the comparativist, as listed above, a final reason that I offer as to why we might not only want to compare, but also why we might find that we need to compare, is one that I borrow from the comparative study of modern languages. Anyone who has ever attempted to study a second or third language generally will acknowledge that in the process, he or she learns more about his or her mother language than had been known before. The reasons are that one learns a second language from the rules—from rules of grammar, syntax, punctuation, spelling, and usage. But one learns his first language simply by practicing it and being in the constant use of it, without the opportunity, and one might even say the ability, to step back and observe, question, and reflect upon the language's different structures, parts, and functions.

III. HOW DO WE COMPARE?

From addressing the question of why we compare, we turn to the question of how we go about comparing. Like other social disciplines (e.g., literature) and professions (e.g., medicine, architecture), law can be studied comparatively. If we are studying law comparatively here, we should take advantage of what the methods of the comparative disciplines have revealed. While we did not suggest that we follow any prescriptive formula in presenting the national reports of the seminar, the comparative method provides a helpful structure by which to go back and review the presentations and our discussions. With due respect to the critiques of Curran, Teitel (*infra*), and others, I shall nevertheless maintain the position held by so many that the work of Zweigert and Kötz presents what one might call the "orthodoxy" of comparative legal study. In recognizing that the study of law in general, and com-

8. Separation of Powers Program 3 (Nov. 7, 2008).

parative law in particular, is clearly a social science for Zweigert and Kötz, we might therefore begin with an hypothesis.[9]

But before we do, as a preliminary measure, one must be clear about whether he or she is conducting a macrocomparison or a microcomparison. According to Zweigert and Kötz, a macrocomparison concerns the spirit and style of different legal systems and the methods and thought of those systems.[10] For example, one could study different techniques of legislation, styles of codification, methods of statutory interpretation, the authority of precedents, and the contributions of scholars to the system of law. A microcomparison concerns specific problems instead, and therefore studies the rules used to solve those problems or conflicts. Allocation of loss in a traffic accident, manufacturer liability, and rules determining child custody are a few examples of microcomparison.[11] Our seminar has presented macrocomparison. But even with macrocomparison, "[o]ne can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted."[12] Through the speakers' texts, oral presentations, and the questions and answers with the audience and speakers, a set of common macrocomparative themes began to emerge from our speakers' reflections, such as what the separation of state powers does and does not accomplish. One may consider Montesquieu's tripartite system of separation of state powers to be prevalent,[13] but new and administrative separations whose lines of separation are not those of Montesquieu may be more the rule than the exception. Professor Luis Fernando Solano Carrera noted well the role, context, and limits of Montesquieu's distinctions. In addition to the benefits of separating the powers of the state, there are benefits to keeping some functions together. What tools are necessary to enable the separation of state powers? And finally, what is the role of virtue in achieving the goals of justice and good governance through the separation of state powers?

After these preliminary matters are dispensed, Zweigert and Kötz proceed to lay out a method for conducting a proper comparison.[14] They say we should first lay out the essentials of the rele-

9. ZWEIGERT AND KÖTZ, *supra* note 2, at 34.
10. *Id.* at 4.
11. *Id.* at 5.
12. *Id.* at 6.
13. CHARLES-LOUIS DE SECONDAT & CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Prometheus Books 2002) (1748).
14. ZWEIGERT & KÖTZ, *supra* note 2, at 34.

vant foreign law, country by country,[15] much as we did in organizing this seminar as presentations of the law of separation of powers, country by country. A cautionary flag pops up again, however. In his *Grammar of Motives*,[16] Kenneth Burke maintains that all comparison leads to hierarchy. In applying Burke's assertions to our seminar, I would like to take a step back and add a note, reminding myself of something even prior: that all listing and categorization leads to comparison. When we put these two cautionary tales together, we see that when we list and categorize legal systems and their inclusion or omission of varying notions of separating the powers of the state, we are inevitably comparing, and if we then take Burke's admonition seriously, we are cautioned that we will inevitably create a hierarchy. Thus, we need to be conscious of the hierarchies we create and be able to defend and explain them. But these cautions should not deter the student or the scholar, because just as it is said that a person who knows only one religion, knows none, or who knows only one language, knows none, so too the student or scholar who knows only one legal system, knows none.

After laying out the essentials of the relevant countries, Zwiegert and Kötz build a system through syntax and a vocabulary that is capable of discussing the essential building blocks.[17] This step proved to be a more difficult task during our seminar than one might have first imagined. Historically, practitioners have tried to circumvent this problem by reference to a common ancient language, such as Latin, or a common modern language, such as French. But as an astute observer in our seminar's audience noted, even the term *separation of powers* in American English inherently cannot have an exact cognate in another culture with another language. The audience member asked whether the same foundational legal document in five different countries essentially meant there were five different systems, and our distinguished panel unanimously agreed that the answer must be "yes." Legal translators can tell us the same, despite the legal fiction at the end of a treaty that says that several different languages can each claim to be an official version of the treaty. This revelation would be consistent with what is known as the *pluralist* school of comparative law, in which one identifies what is different between jurisdictions, stresses the need for understanding the local con-

15. *Id.* at 6.
16. KENNETH BURKE, GRAMMAR OF MOTIVES (Univ. of Cal. Press 1969) (1945).
17. ZWEIGERT & KÖTZ, *supra* note 2, at 44.

text, and emphasizes the notion that "even when similar concepts are being used across jurisdictions, they may not necessarily play the same role in each."[18] I will return to some applications of pluralism a bit later.

In a recent seminar in comparative law of Europe, I required the students (some of whom are in our seminar's audience) to take a short piece of legal text from another country, translate it, and then provide me with the original, the translation, and a narrative of their translation experience. They were free to use any tools they wished, and many turned to online translators to do the work for them, which I allowed, thinking I knew in advance what that exercise would likely yield. "There is no valid way to piece together this information to make a valid English sentence," was one comment. Another offered: "I used a three-step process to perform the translation from German to English. First, I entered each word individually into LEO.[19] LEO provided a list of potential English word equivalents. The number of English word equivalents ranged approximately from five to more than twenty-five. I selected the three English word equivalents that I thought were most likely to be correct." A third student explained:

> Once I had successfully translated the terms, I attempted to understand the English sentences I had created. [. . .] A disconnect between German and English grammar rules frequently required the addition or omission of words for the English translation to be grammatically correct and easily understood by the reader. [. . .] Anything less than fluency in both languages would make this process challenging, and, in a way, dangerous to attempt.

These valuable experiences for the students helped them to see the fallacy in thinking that comparison can be conducted by a mechanical one-to-one word translation.

As lawyers, we like to have our own technical terms and technical definitions, the mastery of which, and the shared common use of which, give us the license to practice law. This shared common usage is essential to understanding the meaning of the words. Shared common usage creates boundaries of meaning that are constantly negotiated, thus frustrating the mechanical sense of

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18. MCCRUDDEN, *supra* note 3, at 374-75.

19. LEO Homepage, http://dict.leo.org/. LEO is an online, free German-English translation software application.

one-to-one word translation to a different language. Take, for example, our featured term *separation of powers*—a term that is not even stated, let alone defined, in the U.S. Constitution, as Judge D. Brooks Smith of the U.S. Third Circuit Court of Appeals reminded us. Smith says that Alexander Hamilton spoke instead of the "utility of the union to prosper." Understood dialectically, *separation of powers* means the powers are not found together, right? Absent separation, where would the powers otherwise be—all in the executive or all in the legislature or all in the courts? What is included among the powers to be separated? What else should be part of the understanding of the "powers"? How does separation of powers serve different cultures differently? It may serve the common law, constituted by a history of experience, according to Holmes,[20] differently than it serves the civil law, which wants to treat law as a social science of deductions from norms. As Judge Smith noted, the powers of the state may well not be really all that separate, but just under different foci at different times. In a similar vein, an audience member also offered that the separation of powers is a continuum, not discrete chunks.

There are practical consequences for these language difficulties. Picking up on what Professors Garro and Rosenn said earlier about the connection of the existence of terms for *accountability*, *coup d'état*, and *procurator general*, Professor Brand maintained that admonitions to the "rule of law" (as with the European Union's Copenhagen Criteria or with U.S. foreign policy) do not work because we cannot agree upon a concrete cross-cultural definition for "rule of law." Difficulties in an agreed-upon definition in recent years for the word *terrorism* have presented stumbling blocks to international treaty agreements as well. Brand feels the same is true for separation of powers.

But perhaps *separation of powers* means different things to different people in different times and different places because it is a legal concept attempting to meet different needs. The separation of powers has metamorphosed from Montesquieu's three to Brazil's four (or five) to a different five in the European Union. Professor Rosenn pointed out, for example, that, in addition to Montesquieu's tripartite branches, the military in Brazil has always regarded itself as the guardian of the constitution and, as such, a fourth branch of government. Furthermore, originally the Em-

20. "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little Brown Company, 40th ed. 1946) (1881).

peror was both chief executive and "moderator," a fourth or fifth branch of government. Professors Kay Windthorst and Saso Georgievski added that, aside from the European Court of Justice (and its Court of First Instance), the institutions of the European Union government do not follow the tripartite model. The Parliament, Council, and Commission all share parts of both the legislative functions and executive functions, depending upon what substantive powers of the constitutive treaties are being called upon. Instead, the identity of each of the three is determined more by the constituency to whom it is responsible. Thus, the Commission is responsible to the Union as an independent legal entity, the Council members remain responsible to their respective home countries, and the Parliamentarians are each responsible to the citizens of Europe on the whole, not to the citizens of any one country. This realignment scrambles the tripartite system and realigns it to structure a different form of government to meet different needs of the people than does Montesquieu's tripartite version of separation.

After laying out the essentials of the relevant foreign law, country by country, Zweigert and Kötz admonish us to use these essentials as a basis for critical comparison,[21] all the while minding what they call the *functionality principle.*[22] The functionality principle cautions the comparativist not to compare similar things that nevertheless have different functions. Comparison must be for things that function the same, although they may look different. Thus, if one finds that different countries meet the same need in different ways, one must ask why.[23] One might describe functionalism as "an approach that 'treats comparative law as a technique of problem solving.'"[24] Further, "functionalism considers 'the relevant unit of analysis' not as 'a geographic entity, such as a country or region, but . . . rather the problem and its legal solution.'"[25] With functionalism, the subject of comparative analysis is the legal problem, excised from its context. The German legal philosopher Reinhold Zippelius applied functionalism to separation of powers in the civil-law tradition:

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21. ZWEIGERT & KÖTZ, *supra* note 2, at 6.
22. *Id.* at 35.
23. *Id.* at 44.
24. MCCRUDDEN, *supra* note 3, at 374 (citing Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2574 (2004) (book review)).
25. *Id.* at 374-75 (citing Teitel, *supra* note 24, at 2584).

> Pursuant to the principles of separation of powers and legal certainty, it follows that the law sets general norms that are binding upon administration and adjudication. Accordingly, administrative and judicial bodies must determine as a matter of principle, and according to rules of interpretation, what the intent of these norms are; and, in so doing, they must abide by that intent. At the same time, however, consideration must also be given to the principle function of the law in providing just solutions to problems.[26]

There are at least two critiques of functionalism, however: pluralism (previously mentioned) and the *dialogic* method of comparativism. Ruti Teitel and others feel the dialogic method is more contemporary and responds to "'the present context of a globalizing politics.'"[27] Particularly in the context of comparative constitutionalism, the dialogical approach focuses on the processes of constitutional interpretation. "Comparative exchange is not bound in path-dependent or hierarchic ways. Rather, it poses a comity-based 'transjudicial[ ]' enterprise—a decentered view of constitutional practices deriving from pluralist sources, with the possibility of 'cross fertilization.'"[28]

IV. WHAT RESULTED FROM THE COMPARISONS?

One of the advantages of macrocomparison is the comparison of the various legal practitioners within any given system. It is not only the substantive law that creates and maintains a separation of powers, but also the training and professional activities of the various legal practitioners within the systems that are important. In addition to legislators, governors, and judges, Professor Ken Gormley pointed out, for example, that we need to add the role of independent counsel. To that, I would also add advocates, administrative agents, and even the media (as the so-called fourth estate), if for nothing else, for identifying and reminding us which judges were appointed by whom. In fact, it occurs to me that perhaps another way out of our conundrum of assumptions in comparing would be to compare concrete social phenomena in the law rather than abstract legal concepts. For example, one can make a comparative legal study of the education and training of persons

26. ZIPPELIUS, *supra* note 4, at xi.
27. MCCRUDDEN, *supra* note 3, at 375 (citing Teitel, *supra* note 24, at 2584).
28. Teitel, *supra* note 24, at 2586 (brackets in original) (internal citations omitted).

in a legal system. How many hours do they work? What is the male-to-female ratio? What powers do the various types of legal actors have in the system? What is the relationship of the military or the political actors to the legal actors? This study may, in some sense, be thwarted by the U.S. American notion that, as a nation of laws, not of men, we are intent upon equating justice with a science of abstract principles rather than one of socially observable phenomena. As a counterfactual example, Professor Saso Georgievski of Macedonia pointed out that, since independence, it has been precisely when the Republic of Macedonia has failed to separate the powers of the state that the state has been at its weakest.

Another recurring theme that emerged during our seminar was that of judicial independence. Professor Solano Carrera emphasized the connection between the independence of judges and the functioning of the rule of law. In order for powers of state to be successfully separate, each branch needs sufficient power of its own to remain independent, not as a matter of constitutional legal theory, but—especially in the case of the judiciary—from undue influence by economics, politics, or the media. Judge D. Brooks Smith, who himself has spent considerable time lecturing abroad and examining the comparison of the U.S. judiciary with other countries, feels that it is essential to know the nuances of how persons are made judges and what their particular functions may be, and that, therefore, the U.S. should not export U.S. ideas of judicial review. Judge Smith suggested, and the seminar nearly unanimously agreed, that for the judiciary to remain independent, it is necessary that judges receive life tenure and sufficient pay, and not simply be called "independent" or "separate" by the constitution. The question was then raised as to whether one can determine the amount of sufficient pay *a priori*, or only know that a system has failed to do so when enough judges have begun to acquire money through other means. Forty dollars per month is obviously not sufficient, as Professor Rosenn noted, but what is? How is "enough" determined? It would seem that "enough" is not determined scientifically nor uniformly, but culturally, through the expectations about the worth of a judge and the cost of what it means to live like a judge. Professor Rosenn maintained that these expectations were characteristically lower for judges in the civil-law tradition than judges in the common-law tradition.

Returning to the statement made by Hugo Chavez, President of Venezuela, "I am the law; I am the state," Professor Allan R. Brewer-Carías noted that, although a system of checks and bal-

ances cannot allow an individual to claim to have all the powers of the state, the rule of law need not be equivalent to the elimination of the person. Participants agreed and arrived at the notion that, since the Enlightenment, it is true that legal power, in theory, begins with the individual person, but the rule of law must balance that power. This role of the individual then evolved as the seminar progressed, and we eventually arrived at the notion that the public virtue of the individual is also an essential ingredient to keep powers of government separated from each other. Indeed, Judge Smith maintained that the degree to which a constitution works is dependent upon the virtue of the individual persons who will be applying it. Again calling upon his experiences in Eastern Europe, Judge Smith insisted that public virtue is necessary and cannot be fully replaced simply by a constitution that separates powers and then places checks and balances among the separated branches carrying out those powers. Professor Bruce Antkowiak quoted James Madison as having insisted that "[i]n a republic, one must cultivate virtue," thereby noting that a republic must be more than a free market. But how does the legal system act to cultivate virtue? "First of all, you need a strong, homogenous civil society," answered Dr. José Gamas Torruco.

The Immediate Past President of the Inter-American Bar Association, Renaldy J. Gutierrez, also in reference to the tactics and politics of Venezuelan President Hugo Chavez, maintained that "populism is a threat because it attracts people with illusions." While this remark may have largely been in reference to Chavez, it does address the question raised earlier of how expectations or illusions are created. But this question brought us again back to personal virtue. Duquesne University President Charles Dougherty noted in the seminar's program that the question of cultivating virtue is a question at least as old as ancient Greek society. The ancient Greek word *arête* is typically translated as "virtue." Records indicate that, already by the fifth and fourth centuries B.C., *arête* as applied to men had developed to include quieter virtues, such as *dikaiosyne* (justice) and *sophorosyne* (self-restraint). But by the time Plato and Aristotle reflected upon the issue in the fourth century, they had located justice among politics, not laws. Unfortunately, in today's U.S. American legal education, we often tacitly leave justice to politics as well, and in law, we train students to treat justice as a low-level policy argument. I often tell the story of having invited a hydrogeologist to lecture to my environmental law students on the technical science behind a particular set of regulations. Having never sat through a lecture in law,

she asked me prior to her lecture, "What kinds of things do you discuss in law school?" I told her about torts and contracts and civil procedure and tax and so forth. She replied, "No, I mean what kinds of issues—for instance, do you talk about justice?" I laughed and said she would be addressing upper-level students, and that by the time they are upper-level, they will have been trained not to use that argument. Sure enough, after her lecture, I invited students to analyze why some water-quality cases had been decided as they had been. "Judicial efficiency" was one answer; "balancing of interests" was another. "How about justice?" I offered. A third of the 25 students present laughed audibly. My hydrogeologist guest was aghast.

Having catalogued the issues of separation of powers that were raised by the various national reports, I now turn to the final analysis of whether these tools offered for comparison in our catalogue can, put together or singly, lead to justice and good governance. First, I am reminded of the limits of the separation of powers. As Judge Smith noted, the separation of state powers, as an area of substantive law, is not just about the maintenance of separation but is also about what happens when the several branches of the state interact. Here, one is reminded that even the creator of reductionist positivism, Auguste Comte, said that, while his positive philosophy would drive us to reduce questions to specializations, and then all specializations to mathematics, at the end of the specializations, a generalist is needed to hold it all together.[29] Dr. Kay Windthorst of Germany offered many examples from the structure of the separation in the government of the Federal Republic of Germany that demonstrated separate organs with separate functions that nevertheless complemented rather than competed in the power structure. Furthermore, although we focus at this seminar on the separation of powers, we must keep in mind that the principle of the separation of state powers alone is not a panacea; it will not eradicate war, poverty, or any of the ills of humanity, as we were reminded by John D. Richard, Chief Justice of the Federal Court of Appeal in Canada. It may indeed be a necessary condition for justice and good governance, but it alone is not sufficient. Here, I am reminded of something further that Reinhold Zippelius said:

29. AUGUSTE COMTE, THE FUNDAMENTAL PRINCIPLES OF THE POSITIVE PHILOSOPHY (Paul Descours & H. Gordon Jones trans., 1905) (1851).

> The function of the law in offering solutions capable of attaining consensus to questions of justice can also, however, come into conflict with the strict obligation of the law. That happens when the statute, as interpreted according to the rules of the art, apparently does not satisfy its function in serving justice. When, in such a case, the grounds for doing justice outweigh the grounds for separation of powers and legal certainty—which speak for the strict adherence to the wording of the statute—then supplementing or correcting the statute is necessary.[30]

I am also reminded that another theme to emerge, and also one that was determined to be necessary—but not alone sufficient—to maintain the separation of state powers, is a system of checks and balances among the branches. Judge Smith maintained that separation of powers is as much about balance and interdependence as it is about separation, however. In support of his point, Smith noted that every year, members of the Congress raise constitutional amendment bills, usually in response to some perceived incorrect judicial interpretation, but the vast majority of those bills is not, of course, ever passed.

Finally, I come full circle in combining the method of Zweigert and Kötz in this seminar comparing the separation of powers in various systems with the goal of justice,[31] and I arrive back at the critique of Zweigert and Kötz offered by Vivian G. Curran. But now, I am also reminded of the work of James Boyd White that ties virtue to translation. In building upon the importance of personal virtue by judges, media, and citizens in maintaining separation of powers, we arrived at the unique problems presented in doing so within a comparative framework. The comparative framework demands translation of the most obvious kind, but within the obvious acts of translation, many subtle substantive points are made. "[I]t is only too typical that the 'content' of any medium blinds us to the character of the medium," noted Marshall McLuhan.[32] In *Justice as Translation*,[33] James Boyd White said:

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30. ZIPPELIUS, *supra* note 4, at xi.

31. According to Zweigert and Kötz, justice is the goal of the comparativist. ZWEIGERT & KÖTZ, *supra* note 2, at 47.

32. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 24 (Signet Books 1964).

33. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (Univ. of Chicago 1990).

> While there are some situations where translation seems as a practical matter to work well enough, there are others where it is in any full sense plainly impossible: think of translating a poem, for example, or a political speech, or an expression of love, from one language to another. In such cases[,] the very activity of translation brings us again and again to face that which is particular or unique to the language and its context, to the speaker himself, and therefore cannot be translated, cannot be "set over," into another. Even to attempt to translate is to experience necessary but instructive failure. In this sense[,] translation forces us to respect the other—the other language, the other person, the other text—yet it nonetheless requires us to assert ourselves, and our own languages, in relation to it. It requires us to create a frame that includes both self and other, both familiar and strange; in this I believe it can serve as a model for all ethical and political thought.[34]

An essential component of comparison is translation. Translation may mean the obvious sense of translating one modern language to another, but it may also mean the more subtle task of translating the "foreign" meaning of something that appears in the same modern language as the audience is using. When we do the former, we may act as though we are not doing the latter; that is to say, we may act as though it is possible to conduct a one-to-one translation from one spoken or written language to another and create the same meaning. That, of course, is impossible, and much has been written in the fields of translation studies and linguistics on that weak assumption and its ensuing problems. But it is through this more obvious sense of translation that we come to the subtly powerful translation assumptions of equating one culture with another, once we have "equated" them through a common modern language. And this brings us back to the macro-comparison problem that we addressed in this seminar: Does *separation of powers* mean the same thing in one country with its own language, such as Brazil, as it does in another country with its own languages, such as Canada?

V. CONCLUSIONS

What might be the future for the separation of powers? In reflecting upon the separation of powers in the Republic of Mace-

34. WHITE, *supra* note 33, at xvii.

donia and the Federal Republic of Germany, Professors Saso Georgievski and Kay Windthorst, each respectively noted that the impact upon their countries is felt in the way in which the European Union's governance separates the powers of government. This is perhaps the largest and strongest departure from Montesquieu's tripartite division of the functions of the state over and against those of the individual citizen. Zweigert and Kötz ultimately wanted theirs to be a pragmatic enterprise, perhaps belying their universalist tendencies, and thus they prescribed that the comparativist conclude with the proper policy for the law to adopt, a process which may involve a reinterpretation of one's own legal system.[35] Beyond the mechanics of juxtaposition, even for Zwiegert and Kötz, other considerations are required as well. For example, as was already discussed under the rubric of macrocomparison, one is not to confine his or her comparisons to substantive law[36] but is also to portray the way in which the law is created and applied, the style of judgments, and the training and professional activities of the various legal practitioners within the systems.[37] With this framework in mind, and the lessons learned about the inability to translate concepts from one culture to another, the future might well look in the direction of new separations, such as those in the European Union. The example of Europe also offers a way in which to allow for a healthy degree of independence and autonomy due to the inability to entirely translate one culture to another.

35. ZWEIGERT & KÖTZ, *supra* note 2, at 6.
36. *Id.*
37. *Id.* at 30.